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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 997

LEE ART THEATRE, INC. *Petitioner*

v.

COMMONWEALTH OF VIRGINIA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

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To the Honorable the Chief Justice and Associate Justices of the United States:

Petitioner prays that a Writ of Certiorari issue to review the judgments of the Supreme Court of Appeals of the Commonwealth of Virginia entered in the above entitled case on the 10th day of October, 1967 (Appendix A and B).

OPINIONS BELOW

There were no written opinions in the courts below.

JURISDICTION

The judgments sought to be reviewed are final judgments of the Supreme Court of Appeals of the Commonwealth of Virginia dated and entered on the 10th day of October, 1967, affirming the convictions of the petitioner.

Jurisdiction of this Court is invoked under Title 28, United States Code, § 1257 (3).

QUESTIONS PRESENTED

I. Whether an affidavit executed for the issuance of a search warrant which recites as the material facts constituting probable cause only: "personal observations of the . . . motion picture. . . ." and a search warrant issued thereunder for "lewd and obscene" motion pictures is so general and conclusory as to offend the Fourth Amendment to the United States Constitution.

II. Whether the Fourth Amendment to the United States Constitution which specifies that probable cause must exist for the issuance of a search warrant means that a search warrant and the affidavit executed to obtain the warrant must contain a statement setting forth when the offense was committed as well as a recitation showing when the officer obtaining the warrant observed the offense.

III. Whether Title 18.1-227 of the Code of Virginia which defines obscenity offends the standards of obscenity set by this Court in that the Virginia statute does not protect from prosecution motion pictures which contain redeeming social value within the meaning of the First Amendment to the United States Constitution.

STATUTE INVOLVED

Title 18.1-227 of the Code of Virginia.

§ 18.1-227. "Obscene" defined.—The word "obscene" where it appears in this article shall mean that which considered as a whole has as its dominant theme or purpose

an appeal to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representaton of such matters.

STATEMENT OF FACTS

Petitioner was convicted by the Hustings Court of the City of Richmond for violation of Title 18.1-228 of the Code of Virginia which defines possessing and exhibiting lewd and obscene moton pictures.

In this prosecution, motion picture films were introduced into evidence over petitioner's objection. These films were seized from the petitioner by the police of the City of Richmond pursuant to a search warrant and affidavit for search warrant which were executed on March 31, 1966.

The affidavit stated that it was being issued in order to obtain a search warrant for "possessing, exhibiting and showing lewd and obscene motion pictures. . . ." The material facts constituting probable cause were stated as: "Personal observation of the above motion pictures and previews. Observation of the billboard in front of the theatre." (R. p. 363, Appendix C) The search warrant executed as a result of this affidavit authorized a search for "lewd and obscene motion pictures and other pornographic material." (Appendix D)

A motion to suppress the motion pictures seized under this warrant was made and denied. (R. p. 343-346; 376-377; 395-404; 410-413) Over petitioner's objections the officer seizing the films was permitted to introduce them into evidence and the films were then shown to the jury (R. p. 114; 117-118).

Petitioner also challenges the Virginia statute upon which the information charging him with exhibiting and possessing obscene motion pictures was based. Petitioner alleged that the statute failed to recite a constitutionally valid standard of obscenity in that that statute omitted

from its definition of obscenity works which have redeeming social value (R. p. 6-11). In fact, at the trial the petitioner produced evidence that the films did contain redeeming social value (R. p. 279-280).

The jury found petitioner guilty (R. p. 336-337) and the Court entered judgment in accordance with the verdict (R. p. 340).

On October 10, 1967, the Supreme Court of Appeals of Virginia refused to grant a Writ of Certiorari and thereby affirmed these convictions.

REASONS FOR GRANTING THE WRIT

I.

The affidavit utilized in this case recited only "personal observations of . . . motion picture and previews."

It is initially apparent that no facts are alleged in the affidavit to justify a search for "lewd and obscene" motion pictures. The affidavit made no effort to comply with the command of Title 19.1-83 of the Code of Virginia which prohibits the issuance of a search warrant where material facts constituting probable cause are not alleged (Title 19.1-85 of the Code of Virginia). That the words "lewd and obscene" are conclusory and not supported by material facts in self-evident. As the United States Supreme Court stated in *Stanford* v. *Texas*, 379 U.S. 476 (1965), in suppressing a similar search warrant: "The indiscriminate sweep of that language is constitutionally intolerable. To hold otherwise would be false to the terms of the Fourth Amendment, false to its meaning and false to its history." The Fourth Amendment's standard for search warrants was set forth in *Aguilar* v. *Texas*, 378 U.S. 108 (1964) ". . . The Magistrate must be informed of the underlying circumstances . . ." The Court further stated in suppressing the evidence gained under the *Aguilar* warrant "For all that appears, the source here merely suspected, believed or concluded . . ."

The instant warrant is no more discriminate than the ones condemned in *Stanford* and *Aguilar*.

II.

Petitioner further alleges that the search warrant and affidavit for search warrant were wanting in another material respect. Neither document recited when affiant made his observations nor was there a statement as to when the alleged offense giving rise to the warrant occurred (Appendix C & D).

While this precise point may not have been presented to this Court, it is so well settled, that petitioner urges this failure alone destroys probable cause.

In *People* v. *Musk*, 383 N.W. 865 (Michigan 1925), an affidavit for search warrant which failed to allege time was held to be fatally defective by the Court which states: "It will be noticed that in the affidavit it was not stated when the intoxicated persons were seen, nor when persons drinking moonshine whisky on the premises did their drinking nor when the whisky was purchased . . ." Similarly in *Messer* v. *Commonwealth*, 350 S.W. 2d 486 (Kentucky 1961), the principle was stated that affidavits for a search warrant must disclose the time at which the observation was made. *Welchance* v. *State*, 114 S.W. 2d 731 (Tennessee 1938) held that the time requirement of a search warrant was held essential to the question of probable cause.

Finally on this point, not only are the courts unanimous that an allegation of time is essential, but as put by the text writers in 100 ALR 2d 528: ". . . this rule is apparently so well recognized that few cases contain a positive statement to this effect." It necessarily follows that allowing the introduction of the seized films into evidence under an invalid warrant was prejudicial error and repugnant to petitioner's rights under the Fourth Amendment to the United States Constitution.

III.

Under the Virginia Code the word "obscene" is defined as: ". . . that which considered as a whole has as its dominant theme or purpose an appeal to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters." (Title 18.1-227 of the Code of Virginia)

However, in *Roth* v. *United States*, 354 U.S. 476 (1957) the Supreme Court rejected a work only where it was utterly without redeeming social importance. The Virginia statute while purporting to define obscenity completely omits and therefore by inference includes constitutionally protected works that *Roth* would approve when redeeming social value is shown.

In *Jacobellis* v. *Ohio*, 378 U.S. 184 (1964) where a conviction of a manager of a motion picture theater was reversed, the obscenity test was stated as whether to the average person applying contemporary community standards the dominant theme of the material taken as the whole appeals to prurient interest. The Court went on to say that a work may not be denied its constitutional protection unless it is "utterly" without social importance.

The Virginia statute in failing to provide a protection for works containing redeeming social value is therefore repugnant to the First Amendment to the United States Constitution.

CONCLUSION

It is respectfully submitted that the foregoing Petition for a Writ of Certiorari should be granted.

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APPENDIX "A"

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 10th day of October, 1967.

The petition of Lee Art Theatre, Inc., for a writ of error and supersedeas to a judgment rendered by the Hustings Court of the City of Richmond on the 16th day of November, 1966, in a prosecution by the Commonwealth against the said petitioner for a misdemeanor (Information No. 1), having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition for writing said writ of error and supersedeas, and doth refuse to allow the judgment of the said hustings court.

A Copy,

Teste:

H. J. Travers
Clerk

APPENDIX "B"

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 10th day of October, 1967.

The petition of Lee Art Theatre, Inc., for a writ of error and supersedeas to a judgment rendered by the Hustings Court of the City of Richmond on the 16th day of November, 1966, in a prosecution by the Commonwealth against the said petitioner for a misdemeanor (Information No. 2), having been maturely considered and a transcript of the